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December 12, 2006

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 - 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation – MB Docket 05-311

Dear Ms. Dortch:

The Fiber-to-the-Home (FTTH) Council hereby responds to the *ex parte* of AT&T Inc. submitted on December 4, 2006, in this docket regarding the adoption of a streamlined competitive franchising process.[1] The FTTH Council has been an active participant in this docket supportive of regulatory changes that address the numerous problems faced by would-be competitive video service providers, many of whom are bringing the "triple play" of competitive video, data, and voice services to businesses and consumers. Among those problems has been the difficulties of new competitors obtaining franchise authority from municipal and county franchising authorities ("local franchising authorities" or "LFAs") in a timely and cost efficient fashion. Earlier in this proceeding, the FTTH Council advocated, in addition to the adoption of regulations spelling out the substantive limitations placed on LFA franchising actions under the Communications Act of 1934, as amended (the "Act"), the adoption of a nationwide streamlined franchising application process using a Model Franchise Agreement.[2]

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1 Letter of Jim Lamoureux, General Attorney, AT&T Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, dated Dec. 4, 2006 ("AT&T Automatic Franchise *ex parte*").

2 Letter of Thomas Cohen and Edward A. Yorkgitis, Jr, Kelley Drye & Warren LLP, Counsel for the Fiber-to-the-Home Council, MB Docket No. 05-311, dated May 19, 2006 ("Model Franchise Agreement proposal").

Concomitantly, the FTTH Council advocated that the Commission make it a rule that a delay in acting on an application for a franchise within a Commission-specific time period (optimally thirty days) should be deemed an unreasonable refusal to award a competitive franchise in violation of Section 621(a) of the Communications Act of 1934, as amended (the "Act").[3] The FTTH Council's proposal contemplated that, if the LFA a failed to act within the franchising timeframes set out in the Commission regulations, the absence of a decision would be treated as a "final decision" under the Act and that, accordingly, the applicant would have the ability to seek injunctive relief before the courts under Section 635 of the Act to operate under the Model Franchise Agreement.

The AT&T Automatic Franchise *ex parte* proposes another – and, in many ways complementary, – approach. Instead of having an applicant that already is entitled to occupy the public rights-of-way[4] go to court to obtain operating authority when an LFA unreasonably denies the award of a franchise by virtue of failing to act on the application in a timely fashion, AT&T advocates adoption of Commission rules whereby the applicant would constructively receive *interim* cable franchise authority after the end of 30 days in the absence of an LFA decision. Significantly, the *interim* authority would expire as soon as the LFA legitimately exercised its authority, either to grant or deny the franchise application.

The FTTH Council believes the AT&T proposal has merit and should be incorporated into the Commission's Rules. As AT&T explains, while a finding by the Commission that delays of 30 days or more by LFAs in granting a franchise are unreasonable is welcome, this does not directly translate into an assurance that franchises will be awarded within a reasonable time frame (barring the presence of justified reasons for denying a franchise). The absence of a mechanism giving an applicant the assurance that it will receive rapid consideration of its application is particularly acute in the case of applicants that already have authority to occupy and use the public rights-of-way. In this scenario, an LFAs ability to prevent the applicant from providing additional services should be extremely curtailed. The Senate Report accompanying the 1984 Cable Act made clear that the source of the jurisdiction of local governments over cable systems "continues to be [cable's] use of local streets and rights of way."[5] The Cable Act was designed, in part, to address the fact that there was "no longer a reasonable relationship between local regulation and a cable system's use of streets and rights of way."[6] The Cable Act was intended to restore the balance of local right-of-way regulation with

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3 *Id.* at 2. *See also* Comments of the Fiber-to-the-Home Council, MB Docket No. 05-311, filed February 13, 2006, at 61-63 ("FTTH Council Comments") (initially advocating a period for franchise review not to exceed four months).

4 For example, the applicant may hold a telecommunications franchise.

5 S. Rep. on S. 66, No. 98-67, April 27, 1983, at 6.

6 *Id.*

the regulation of the operational aspects of cable communications, the former exercised by local authorities and the latter within the jurisdiction of the Commission.[7]

AT&T's proposal is consistent with that restored balance at the heart of the Act's cable provisions. The Commission, both before and after the 1984 Cable Act, has had authority to award franchises to cable companies, although it has conceded, in most cases, that LFAs would remain free to exercise their principal authority in this regard. The House Report accompanying the 1984 Cable Act recognized the Commission exercise of jurisdiction over cable franchising, noting that although the Commission has once adopted "standards covering the award of franchises, their duration, system construction schedules, access to cable systems, and customer complaints," the Commission had in the later 1970s and early 1980s reduced those standards to voluntary guidelines.[8] In providing that the franchises would be granted primarily at the local level in the wake of the 1984 Cable Act, Congress also underscored that municipal authority was to be subject to Federal standards rather than piecemeal franchising authority regulation.[9]

Significantly, in the 1984 Cable Act (or in the 1992 Amendments), the Congress did not remove from the Commission any of the jurisdiction over franchising that previously had been asserted. The 1984 Cable Act did not mandate that LFAs were the exclusive source of franchising authority, noting that "franchising authority" includes any Federal, state, or local governmental authority empowered to grant a franchise.[10] With its long-established regulatory jurisdiction over the cable industry under the Act[11] and the fact that Congress, mindful of the Commission's previous assertions of jurisdiction over the franchising process (as discussed above), did not seek to curtail the Commission's attempts to exercise that jurisdiction, the Commission is not precluded from adopting the AT&T automatic interim franchising proposal. The Commission's authority to do so is bolstered by its several sources of authority to adopt regulations necessary to carry out the provisions of the Act, including the prohibition against unreasonable denials of competitive cable franchises.[12]

As noted above, the FTTH Council believes that the Commission should incorporate the AT&T proposal into its video franchising regulations. Specifically, as a foundation, the Commission should use the Model Franchise Agreement earlier advocated and

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7 *Id.* at 7.

8 H. Rep. on H.R. 4103, Rep. 98-934, Aug. 1, 1984, at 23.

9 *Id.* at 24.

10 47 U.S.C. § 611(10).

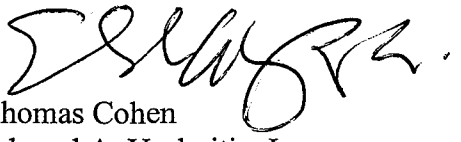
11 *See discussion in* FTTH Council Comments at 52-56.

12 47 U.S.C. §§ 154(i), 201(b), and 303(r).

submitted into the record by the FTTH Council to govern the application process. Second, the Commission should adopt regulations specifying the period following receipt of a complete application, as set forth in the Council's Model Franchise Agreement proposal, after which a failure by the LFA to act on the application would be deemed an unreasonable refusal to award the requested franchise. The Commission should adopt a period as short as 30 days, but in no event longer than four (4) months, although it may choose to adopt two periods, the shorter of which would be for applicants already authorized to use and occupy the public rights-of-way. Third, the Commission should adopt a rule that where the applicant, in the event the LFA permits the allotted time to expire without acting on the application, has the choice *either* (a) to operate under the interim franchise as set forth in AT&T Automatic Franchise *ex parte* pending the LFA's decision *or* (b) to treat the application as denied pursuant to a final decision and (i) seek court review of that decision under Section 635 of the Act and (ii) request appropriate relief, including injunctive relief permitting it to operate a cable system in the public rights-of-way. The Commission should craft the rules in such a way that if either form of election is found to be invalid, the other form remains available to applicants.

This *ex parte* is being filed according to the Commission's Rules.

Respectfully submitted,



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